IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

CONTEMPT PETITION NO.71 OF 1998
WITH
CIVIL APPLICATION NO.15 OF 2005

Shri Suresh Keshavlal Shah. ..Petitioner.

V/s.

Shri Gunawant Ratilal Shah. ..Respondent.

Mr.K.Sivramkrishnan for petitioner.

Mrs.Sheela Tambe i/b. M/s. N.N.Vaishnawa for respondent.

CORAM: A.M.KHANWILKAR,J

DATE : AUGUST 9, 2006.

P.C. :

1. Heard counsel for the parties.

2. In this petition, grievance is made about breach of undertaking given before the court by the respondent/contemnor, as recorded in the order passed by the Small Causes Court at Mumbai dated 20th November, 1997 in R.A.Suit No.1810 of 1997. The parties had arrived at consent terms on the basis of which the said suit came to be disposed of for want of prosecution. Parties filed following consent terms on record on the basis of which suit came to be disposed of.

Consent Terms between Plaintiff and Defendant 1

1. Defendant 1 agrees and undertakes to pay to the Plaintiff on or before 30.11.1997 a sum of Rupees three lacs and fifty thousand only (Rs.3,50,000); with interest at 18% per annum from 24.6.1997 till payment.

2. Plaintiff agrees and undertakes to hand over vacant possession of the suit premises (namely the premises measuring 247 square feet on the first floor of Retiwala Building, 41/45 Nakhoda Street, Mumbai 400 003) to Defendant 1 by 30.11.97 against payment in terms of para 1 above.

3. The Plaintiff drops Defendant 2 from these proceedings and claims no relief against her.

4. Defendant 1 agrees and undertakes to pay a furtehr sum of Rupees eight lacs (Rs.8,00,000) in two equal instalments of Rupees four lacs (Rs.4,00,000/- each; the first on or before 24.6.1998 and the second on or before 24.6.1999. The Defendant further undertakes to pay interest every quarter on the balance remaining out of the said amount from 24.6.1997 until payment at the rate of 18% per annum.

5. No orders as to costs.

6. Suit be disposed off and dismissed for want of prosecution."

3. As mentioned earlier the Court while disposing of the suit accepted the undertaking given by the respective parties. The petitioner/plaintiff has approached this Court by way of contempt petition, which is filed on 18th March,1998. I shall straightway advert to the relevant averments in the

contempt petition. As noted in paragraph 4 and 5. The same reads thus:

> "4. After the initial payment of Rs.3,50,000/- to secure the vacation of the premises; Contemnor has deliberately broken his solemn undertaking to this Court to pay interest as provided in paragraphs 1 and 4 of the terms. The cheque issued by him on behalf of his firm for Rs.80,450 due as interest till 31.12.1997 has not been honoured by his bank. He has failed to pay this amount despite the notice dated 9 February 1998 issued to him. A copy of the said notice is enclosed as Exhibit B. A copy of the reply given by Contemnors advocate thereto is enclosed as Exhibit C. The reply is thoroughly false as no threats were ever held out by the Petitioner to the Contemnor. The Small Causes Court had accepted the undertakings only after satisfying itself that they were voluntary.
>
> 5. The Contemnor has thus committed a flagrant breach of his solemn undertakings to the Small Causes Court on the basis of which he had persuaded the Petitioner not to pursue his suit and to give up his valuable tenancy of the suit premises."

4. Even on fair reading of the allegations in paragraph Nos. 4 and 5 of the Contempt Petition referred to above, the only allegation that can be discerned is that the respondent contemnor has breached the undertaking in payment of interest as provided in paragraphs 1 and 4 of the Consent Terms. However, as the matter has progressed before this court, the case of the petitioner is that the respondent/contemnor has committed breach of clause 4

of the consent terms in not paying further sum of Rs.8 Lakhs in two equal instalments of Rs.4 Lakhs each. The first instalment was due on or before 24th June, 1998 and second was on or before 24th June, 1999. There is no allegation in the contempt petition to this effect at all. The contemnor cannot be taken by surprise and proceeded on such charge, which is not the basis noted in the original petition served on the contemnor alongwith show cause notice. Assuming that the petitioner can be permitted to rely on the further affidavit filed before this court what is intriguing is that the petitioner failed to make reference to the crucial document in the shape of letter issued under his signature dated 27th November, 1997 addressed to Shri.Taraben Ratilal Shah. This document has been placed on record by the respondent contemnor alongwith the affidavit dated September, 2001. The said letter reads thus:

"Shri Taraben Ratilal Shah

Re.:Small Causes Suit No.RA Decl. Suit No.1013 of 1977 Suresh Keshavlal Shah.

V/s.

Gunwant Shah & Anr.

Dear Madam,

> . I confirm that in terms of the consent order in the above matter you have paid to me today a sum of Rs.3,50,000/- in cash and I have received the said sum in full and final settlement of my claim. I have simultaneously handed over vacant and peaceful possession of the premises 1-D on the 1st floor of Retiwala Building, 41/45 Nakhoda Street, Mumbai-400003 free from any claim of any one.
>
> . You are as absolute owner now entitled to deal with the said premises as you deem fit and proper. I shall keep you indemnified against any claim.
>
> . Dated this 27th day of November, 1997.
>
> Witness:
>
> Yours truly,
>
> sd/-
> (SURESH K.SHAH)"

5. Indeed, the petitioner has filed rejoinder affidavit dated 15th October, 2001 with reference to the letter brought on record by the respondent. All that is mentioned in the rejoinder affidavit is in the following terms.

> "g) In the execution proceedings the Contemnor contended in this affidavit in reply dated 28th July 1998 that he had paid me Rs.8 lacs in cash in November 1997 (vide paras 9 and 10 of his reply; a copy of which has been included in my Compilation of Documents). He claims in his present reply to have paid Rs.11.5 lacs and not Rs.8 lacs. I say that on 27.11.1997 he paid me only Rs.3.5 lacs as settled in the consent terms for which I duly issued a receipt. I deny that he paid me any sum apart from the said Rs.3.5 lacs in November, 1997. He may be put

> to strict proof of his contradictory averments about the sum he paid me in November 1997. The contradiction itself is enough to establish that the statements are both false. I say that the Rs.16 lacs due to me under the agreement of 24.6.1997 were backed by promissory notes issued by the Contemnor."

Obviously no explanation whatsoever has been offered as to in what circumstances copy of this letter was not placed on record alongwith the original petition. Besides, in this letter it is clearly mentioned by the petitioner himself that he has received sum of Rs.3,50,000/- in cash on the date of issuing that letter and the said sum is in full and final settlement of his claim. There is no mention in the pleadings filed by the petitioner as to under what circumstances, such statement has been made in the letter sent by the petitioner under his signature as referred to above. It necessarily follows, it will not be appropriate to proceed with the contempt action on the basis of such vague and incorrect statement of fact recorded in the affidavit filed before this court.

6. The counsel for the petitioner however, placed strong reliance on the order passed by the Small Causes Court in appeal no.641 of 2000 decided on 6th August, 2002 & 8th August, 2002, particularly

observations made in paragraph 21 onwards to contend that the Small Causes Court has clearly found that the respondent has committed contempt on account of breach of undertaking given before that court, which was accepted by that court. This Judgment is of no avail to the petitioner. The present petition will have to proceed on the averments made in the proceedings before this court. In any case, in this Judgment, the lower Court has not considered the efficacy of letter dated 27th November, 1997, which has been issued under signature of the petitioner, which is reproduced earlier. If the petitioner himself has given in writing that he has received sum of Rs.3,50,000/- on 27th November, 1997 in full and final settlement of his claim, it is too late in the day for the petitioner to make grievance that further sum of Rs.8 Lakhs in terms of clause 4 of the Consent terms are still unpaid.

7. Counsel for the petitioner also pressed into service memorandum of settlement executed between the parties dated 29th July, 1997 which records the fact that the total outstanding amount payable to the petitioner was Rs.26 Lakhs instead of same has been settled at Rs.16 Lakhs. Even this document will be of no avail to the petitioner. This document was

executed prior to signing of Consent terms dated 20th November, 1997. In other words, rights and obligations of the parties came to be crystalised on 20th November, 1997, for which reason earlier correspondence or documents executed between the parties will be of no avail. As mentioned earlier the letter dated 27th November, 1997 issued under the signature of the petitioner, which is not disputed, records the fact that on that date petitioner has received sum of Rs.3,50,000/- in cash which was towards full and final settlement of all his claim. It is therefore, not open to consider the grievance of the petitioner that any amount is still payable to the petitioner in terms of clause (4) of the consent terms. In any case it is not possible for this court while considering action of contempt against the respondent to enter into probabilities and conjunctures.

8. Suffice it to observe that it is not a case for proceeding against the respondent with contempt action. Hence, this petition is dismissed. Notice issued to the respondents is discharged.

9. At this stage counsel for the respondent submitted that during the previous hearing of this

petition, it transpired that the main grievance of the petitioner was nonpayment of interest component and dishonour of cheque in the sum of Rs.80,450/-. In context of that contention the respondent offered to pay that amount, which has been subsequently accepted by the petitioner. Counsel for the respondent submitted that the petitioner be directed to refund that amount. It is not possible to issue such direction in this proceedings because the respondent conceded that the amount was required to be paid to the petitioner and on that basis proceeded to pay the amount to the petitioner. In the circumstances, request for refund of sum of Rs.80,450/- paid by the respondent to petitioner is rejected.

10. Counsel for the respondent submits that the respondent offered surety in the sum of Rs.10,000/- as the bailable warrant was issued against respondent. Question of refunding that amount does not arise, as order of bailable warrant was required to be issued as inspite of notice respondent did not appear before the court at the hearing, which was required to be adjourned though pending since 1998 to secure his presence at the hearing of the petition.

11. Petition and civil application disposed of on the above terms.